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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/768,394

01/24/2001

Franz Haas

WEB-19967

1357

24131 7590 10/30/2007
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EXAMINER

WONG, LESLIE A

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

10/30/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

09/768,394

Applicant(s)

HAAS ET AL.

Examiner

Leslie Wong

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on July 26, 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 36-59 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 36-59 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

In view of the appeal brief filed on July 26, 2007, PROSECUTION IS HEREBY REOPENED. A new ground of rejection is set forth below.

To avoid abandonment of the application, appellant must exercise one of the following two options:

(1) file a reply under 37 CFR 1.111 (if this Office action is non-final) or a reply under 37 CFR 1.113 (if this Office action is final); or,

(2) initiate a new appeal by filing a notice of appeal under 37 CFR 41.31 followed by an appeal brief under 37 CFR 41.37. The previously paid notice of appeal fee and appeal brief fee can be applied to the new appeal. If, however, the appeal fees set forth in 37 CFR 41.20 have been increased since they were previously paid, then appellant must pay the difference between the increased fees and the amount previously paid.

A Supervisory Patent Examiner (SPE) has approved of reopening prosecution by signing below:

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

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(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 36 and 46-48 are rejected under 35 U.S.C. 102(a) as being anticipated by Sato et al (JP 10-155410).

Sato et al teach a wafer mixture comprising greater than 63.8 % by weight flour excluding water and 2-10% by weight erythritol (see abstract).

Claims 36 and 46-48 are rejected under 35 U.S.C. 102(b) as being anticipated by Berkowitz et al (US 5059432).

Berkowitz et al teach a dough mixture comprising greater than 63.8 % by weight flour excluding water and xylitol (see entire document, especially Examples 1, 2, and claim 4).

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 36-59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kim (US 4442132), Kondo (JP 1-312960), Sato et al (JP 10-155410), and Berkowitz et al (US 5059432).

Kim discloses a baked product comprising flour and xylitol as a sugar replacer (see entire document, especially the abstract and claim 1). Kim discloses that the

product becomes soft quickly. It is noted that Kim discloses all bakery products (see claim 1), where bakery products would include wafers. Kim also discloses the use of egg, which contains water.

Kondo discloses a cake comprising erythritol as a sugar replacer in the amounts claimed (see abstract). Kondo also discloses xylitol, which is an aliphatic polyol as is claimed. None of the claims specifically claim a flour/starch content that differs from Kondo. Kondo discloses the claimed components and a resulting baked product where deformability at an elevated temperature would be no more than obvious.

Sato et al disclose a wafer mixture comprising greater than 63.8 % by weight flour excluding water and 2-10% by weight erythritol (see abstract).

Berkowitz et al disclose a dough mixture comprising greater than 63.8 % by weight flour excluding water and xylitol (see entire document, especially Examples 1, 2, and claim 4).

The claims differ as to the specific type of baked product and the amounts used.

Once the art has recognized the use of erythritol and xylitol as sugar replacers and dough improvers in baked goods, the amount and manipulation of these components would be well-within the skill of the art. At most the amounts are seen as no more than optimization, see *In re Boesch* 205 USPQ 215.

It would have been obvious to a person of ordinary skill in the art, at the time the invention was made, to use xylitol and erythritol in baked products because the use of xylitol and erythritol as sugar replacers and dough improvers in baked products is

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conventional in the art as taught by Kim (US 4442132), Kondo (JP 1-312960), Sato et al (JP 10-155410), and Berkowitz et al (US 5059432).

Applicant has not established criticality to the amounts claimed. The claimed components are known in the art and are used for their art-recognized function to obtain expected results.

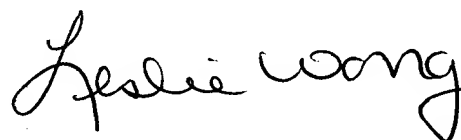
JP 5-103619 is cited as of interest to the claimed invention.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Leslie Wong whose telephone number is 571-272-1411. The examiner can normally be reached on Tuesday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Leslie Wong
Primary Examiner
Art Unit 1794

LAW
October 26, 2007



KEITH HENDRICKS
PRIMARY EXAMINER